> occurred. Prior to entering the residence, neither officer observed whether a violation of law was even being committed in their presence. The residence was secured by Officer Keenan standing guard at the back door. The residence could have been secured by Officer Herstich standing guard at the front door without entering the residence. As in *Olson*, if the Defendants came out they could have been promptly apprehended. See, *Minnesota v. Olson*, supra, 495 U.S. at 102. Further, the underlying alleged verbal domestic dispute does not demonstrate exigent circumstances justifying the warrantless entry into the home. WHEREFORE, upon due consideration and for good cause shown, the Court GRANTS Lance K. Mathis' Motion to Suppress Evidence. Further, considering that the allegations of assault and obstruction of justice against Defendant West were the result of the unlawful entry and arrest, the court GRANTS Roy West's Motion to Dismiss.

The Respondent, State of Ohio, appealed the trial court's decision to the Court of Appeals for the Ninth Appellate District. The Respondent bifurcated the same transaction or occurrence relating to specific events regarding Mr. West and those relating to specific events regarding Mr. Mathis.

As to Mr. West, Respondent argued that he did not have standing to invoke his Fourth Amendment rights because the home in which he was arrested belonged to Mr.

Mathis.[9] Further, Respondent contended that the first officer, Officer Herstich, who initiated the warrantless entry by kicking the door down of Mr. Mathis' home to arrest Mr. West, was lawfully in Mr. Mathis' home because he was in hot pursuit of Mr. West, in that Mr. West was committing the misdemeanor of Obstructing Official Business.[10] The alleged misdemeanor of Obstructing Official Business occurred when, according to the Respondent, Mr. West "took off on foot" to Mr. Mathis' home and closed the door behind him, disregarding Officer Herstich's wish to question him about a verbal domestic dispute.[11] In addition, Respondent contended that, assuming that Officer Herstich violated Mr. West's Fourth Amendment rights in arresting him, Mr. West was not privileged to attack Officer Herstich, whether or not the arrest was illegal under the circumstances.[12]

As to Mr. Mathis, Respondent argued that the warrantless entry to Mathis' home by the second officer, Officer Hamidi, was lawful for the purpose of a "protective sweep" incident to Mr. West's arrest because Officer Hamidi believed that a burglary was in progress.[13] Prior to Officer

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[9]Brief of Appellant, State of Ohio (Appt. Brief, West), Appx. __.

[10]Appt. Brief, West, Appx. __.

[11]Transcript of Proceedings (T.p.), Appx. __.

[12]T.p., Appx. __.

[13]Brief of Appellant, State of Ohio (Appt. Brief, Mathis), Appx. __.

Hamidi's entry, Mr. West was already arrested and in custody outside of Mr. Mathis' home.[14] Prior to Officer Hamidi's entry, he observed the front door of Mr. Mathis home ajar, pushed it opened and smelled marijuana.[15] In conducting the protective sweep, Officer Hamidi discovered clumps of marijuana in plain view.[16]

Petitioners argued that the officers violated Petitioners' rights under the Fourth and Fourteenth Amendments to the United States Constitution based on (1) the initial warrantless entry of Mr. Mathis' home without probable cause and (2) such warrantless entry was not justified under one of the recognized exceptions to enter a home without a warrant.[17]

On December 15, 2004, in a de novo review, the Court of Appeals for the Ninth Appellate District sustained Respondent's appeal.[18] As to Mr. West, the court of appeals held that he lacked standing to raise Fourth Amendment issues when the first officer kicked down Mr. Mathis' door

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[14]T.p., Appx. __.

[15]T.p., Appx. __.

[16]Appt. Brief, Mathis, Appx. __.

[17]Brief of Appellees (Lance K. Mathis and Roy C. West) (Appe. Brief), Appx. __.

[18]Decision and Journal Entry (Decision), Appx. __.

to arrest Mr. West.[19] The court of appeals further held[20] –

> Even if West had standing and Officer Herstich's search was illegal, the assault on Officer Herstich was still sufficiently distinguishable from Officer Herstich's entrance into Defendant Mathis' home so as to purge itself from the taint of the search. Under the "fruits of a poisonous tree" doctrine, only evidence that was obtained through the exploitation of the search is capable of exclusion. *State v. Stringfield* (Sept. 4, 1991), 9th Dist. No. 1991, at 2-3, citing *Wong Sun v. United States*, (1963), 371 U.S. 471, 487, 83 S. Ct. 407, 9 L.Ed.2d 441.
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> West's assault on Officer Herstich was created by West's own misconduct and not an exploitation of the search by Officer Herstich. Therefore, such evidence does not fall under the exclusionary rule as it is separate and distinct from Officer Herstich's initial entry into Mathis' home. See *State v. Kelly* (Sept., 24, 1993), 2nd Dist No. 3007, 1993 Ohio App. LEXIS 4680 at * 11.

As to Mr. Mathis, the court of appeals analyzed the two warrantless entries by Officers Herstich and Hamidi. According to the court of appeals, the first warrantless entry by Officer Herstich was justified in entering Mr. Mathis' home because he was in hot pursuit of Mr. West based on a

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[19]Decision, Appx. __.

[20]Decision, Appx. __.

reasonable belief that Mr. West was the "man involved in a domestic dispute who had threatened to kill his girlfriend and had just fled from the police."[21] With regard to the second warrantless entry by Officer Hamidi, the court of appeals held that it was justified due to Officer Hamidi's reasonable belief that a burglary was in progress.[22] Therefore, according to the court of appeals, Officer Hamidi was permitted to conduct a protective sweep, and, in doing so, he saw and smelled marijuana in plain view.[23] Thus, the court of appeals held that "evidence found in plain view is not subject to the exclusionary rule."[24]

B. Facts Presented at the Evidentiary Hearing on Petitioners' Motions

On January 9, 2004, a call was dispatched to police officers at approximately 6:00 p.m.[25] The call involved a "verbal domestic dispute"/"argument" between a male and a female at 766 Staeger Street[26] in Akron, Ohio. Officer Hamidi, a lone patroller of the Akron Police Department,

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[21]Decision, Appx. __.

[22]Decision, Appx. __.

[23]Decision, Appx. __.

[24]Decision, Appx. __.

[25]T.p., Appx. __.

[26]T.p., Appx. __.

responded to the call.[27] According to Officer Hamidi, the female, Crystal Mae Downing, wished to remain separated from the male, Shawn Adkins, because she thought he followed her wherever she went and also followed her new boyfriend.[28] Officer Hamidi looked to see whether there was a protective order in effect and found none.[29] Officer Hamidi stayed with Ms. Downing at 766 Staeger to prevent a fight in the event that Mr. Adkins returned.[30] Also present at 766 Staeger were Ms. Downing's two children and a female friend.[31] Mr. Adkins was the father of the two children.[32] When he was asked whether Ms. Downing had any evidence of being hit or beaten, Officer Hamidi testified that she was not.[33] Further, Officer Hamidi testified that no misdemeanor was committed in his presence while he was at 766 Staeger.[34] Officer Hamidi also testified that there was no probable cause of any felony committed and no criminal offense of any kind that was committed at 766 Staeger.[35] Prior to the

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[27]T.p., Appx. __.

[28]T.p., Appx. __.

[29]T.p., Appx. __.

[30]T.p., Appx __.

[31]T.p., Appx. __.

[32]T.p., Appx. __.

[33]T.p., Appx. __.

[34]T.p., Appx. __.

[35]T.p., Appx. __.

arrival of Officers Herstich and Keenan, Officer Hamidi learned that Mr. Adkins was 26 years of age, 6'3", 220, white male, brown hair, blue eyes, and with fair complexion.[36]

Subsequently, Akron Police Officers Herstich and Keenan arrived at 766 Staeger in a cruiser to assist Officer Hamidi.[37] Officer Hamidi related to Officers Herstich and Keenan that it was a domestic dispute, the male may be lurking in the area, and he was wearing a "dark coat," red shirt and some blue jeans.[38] According to Officer Herstich, Officer Hamidi informed them that the male threatened to kill his girlfriend and her new boyfriend.[39] However, at no time did Officer Hamidi testify that he informed Officers Herstich and Keenan that the male threatened to kill his girlfriend and her new boyfriend. Despite previously knowing that the male was 26 years of age, 6'3", 220, white male, brown hair, blue eyes, and with fair complexion, Officer Hamidi failed to relate such description to Officers Herstich and Keenan.[40] When he was questioned by the trial court about information on a suspect's race, Officer Hamidi testified that it was normal practice to provide the color of

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[36]T.p., Appx. __.

[37]T.p., Appx. __.

[38]T.p., Appx. __ (quotations added).

[39]T.p., Appx. __.

[40]T.p., Appx. __.

someone as part of the description.[41] When he was asked what were Officers Herstich and Keenan to do if they found the suspect, Officer Hamidi testified, "If they saw him they were to stop him and do a field interrogation card on him and what the nature of his lurking about in cold weather with allegedly 'no coat on would be.'"[42]

Officers Herstich and Keenan proceeded to look for the male, during which time it was dark.[43] Approximately one block away, while in their cruiser, Officers Herstich and Keenan observed a male, whom, according to Officer Herstich, was their suspect because he was wearing a dark leather coat, a red shirt and dark blue jeans.[44] The suspect was standing on the sidewalk in front of 765 Eugene Street,[45] Akron, Ohio. The suspect was later identified as Mr. West,[46] an African-American male. Officer Keenan turned the spotlight on and pointed it to the suspect, at which time they noticed a black male standing on the porch of 765 Eugene, who turned around, walked into the house and closed the door.[47] The black male on the porch was later identified as

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[41]T.p., Appx. __.

[42]T.p., Appx. __ (single quotes added).

[43]T.p., Appx. __.

[44]T.p., Appx. __.

[45]T.p., Appx. __.

[46]T.p., Appx. __.

[47]T.p., Appx. __.

Mr. Mathis, who owned the home at 765 Eugene. According to Officer Herstich, they then pulled up next to the suspect, he exited the cruiser, identified himself as Akron Police, and indicated that they needed to talk to him.[48] Without saying a word, the suspect took off on foot through the front yard of 765 Eugene, went up the stairs, opened the door, went inside the house and closed the door.[49]

At this time, Officer Keenan went around the back of 765 Eugene, Officer Herstich started to kick in the front door, trying to gain entry into the house.[50] The door opened on the second kick and saw the suspect standing in front of the door.[51] Officer Herstich testified that the suspect jumped out at him and swung his arm hitting him on the neck.[52] A scuffle ensued between the suspect and Officer Herstich that took place from the porch to the front yard, where the suspect gave up and was handcuffed by Officer Herstich.[53] During the scuffle, Officer Herstich testified that he was hit in the neck. The suspect was in custody.[54] A female eyewitness, who had a full view of Mr. Mathis' house,

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[48]T.p., Appx. __.

[49]T.p., Appx. __.

[50]T.p., Appx. __.

[51]T.p., Appx. __.

[52]T.p., Appx. __.

[53]T.p., Appx. __.

[54]T.p., Appx. __.

testified that she never saw the suspect take a swing at Officer Herstich.[55]

Upon having the suspect into custody, Officer Hamidi arrived at 765 Eugene and walked towards Officer Herstich and the suspect.[56] Officer Hamidi asked Officer Herstich where his partner was located; Officer Herstich responded, "[H]e's around back."[57] As he asked Officer Herstich about Officer Keenan, Officer Hamidi, who was next to Officer Herstich at the time,[58] noticed that the front door was kicked in and a cracked frame.[59] Whereupon, Officer Hamidi (who stood next to Officer Herstich) thought that there was a burglary in progress.[60] Without inquiry, Officer Hamidi

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[55]T.p., Appx. __.

[56]T.p., Appx. __.

[57]T.p., Appx. __. This fact was incorrectly quoted by the court of appeals and was taken out of context. Officer Herstich's testimony was:

"Q And you see Officer Hamidi come toward you?
A. Correct.
Q What happens then?
A. As he's running up to the front yard he asked me where my partner was. I let him know I didn't know. He ran around back."

[58]T.p., Appx. __.

[59]T.p., Appx. __.

[60]T.p., Appx. __.

proceeded towards the front door.[61] At the front door, he pushed it further open and announced, "Akron Police, is anybody in here?"[62] Upon opening the door, he smelled marijuana and saw clumps of marijuana on the living room floor.[63] He announced his presence again as he walked into the living room and saw a trail of marijuana leading into the kitchen area.[64] Officer Keenan went into the house and followed Officer Hamidi as Officer Hamidi went into the kitchen.[65] They cleared the first floor for burglary suspects and victims.[66] After clearing the first floor, they followed the trial of marijuana which led them to the top of the stairs leading to the basement.[67] They searched the basement and found Mr. Mathis, handcuffed him, took him outside and placed him in the cruiser.[68]

Officer Hamidi then conferred with Officer Herstich and instructed everyone not to go into the house, while they applied for a search warrant based on the marijuana he saw

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[61]T.p., Appx. __.

[62]T.p., Appx. __.

[63]T.p., Appx. __.

[64]T.p., Appx. __.

[65]T.p., Appx. __.

[66]T.p., Appx. __.

[67]T.p., Appx. __.

[68]T.p., Appx. __.

in the house.[69]

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[69]T.p., Appx. __.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The founding fathers were imbued with foresight, based on their experiences before the crown, in deciding to include this provision into the Bill of Rights. Such provision was one of many presented in convincing the people to create a new government, a government that promotes the welfare of the people and that which preserves liberty.[70] The sanctity of the home is fundamental that must be preserved and is a domain upon which intrusions by a government must be prevented unless the reasons for the intrusion are well founded in fact. Unfettered access to property has been well documented in the old world, and this Nation has been, and continues to be, mindful of its dangers.

The fundamental rights conferred by the Fourth Amendment has been made applicable to the States by the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides:

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[70]See generally the Federalist Papers.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), overruled by *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), holding the Fourth Amendment's exclusionary rule applicable to the States.

Where the legislative and executive branches of government have performed their duties under the constitution, the judiciary conducts a final review, when discretion must be exercised, to determine whether the acts comport with fundamental rights conferred by the United States Constitution. This Court is the final arbiter of the Constitution. This Court defines the minimum standards permitted under the Constitution; and this Court sets the minimum protection which the States must honor and below which the States may not deliberate or speculate. The Ohio Supreme Court, in declining to review, and, as such, accepting, the Decision by the Ohio Court of Appeals for the Ninth Appellate District, has violated the rule of law pronounced by this Court.

A. The Supreme Court of Ohio Has Departed from Relevant Decisions of this Court Regarding the

Scope, Intention, and Policy Implications of the Fourth Amendment Relating to Warrantless Searches of One's Home.

In *Payton v. New York*, this Court addressed the issue of warrantless entries of the home in order to make an arrest by reiterating, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." 445 U.S. 573 (1980), citing *United States v. United States District Court*, 407 U.S. 297, 313. In addition, absent exigent circumstances, a warrantless home entry to search for weapons is unconstitutional even when probable cause exists to believe that a felony has been committed and that the evidence is located within the home. *Payton*, 445 U.S. at 588. This Court cited other language that further demonstrates the clear scope and policy intentions concerning warrantless searches of the home:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invitation to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

Payton, 445 U.S. 588-89, citing *United States v. Reed*, 572 F.2d 412, 423 (1978), cert. denied, *sub nom*, *Goldsmith v. United States*, 439 U.S. 913. Further, the Court states:

> In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical

> dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "the right of the people to be secure in their. . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Payton, 445 U.S. 589-90, citing *Silverman v. United States*, 365 U.S. 505, 511. ". . . the Fourth Amendment has drawn a firm line at the entrance of the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. 590. Finally, in *Katz v. United States*, 389 U.S. 347, 351, the Court states, "The Fourth Amendment protects people, not places, and provides sanctuary for citizens wherever they have a legitimate expectation of privacy."

Here, the Ohio Supreme Court abandoned all of the underlying reasoning and protections laid out by this Court's Fourth Amendment jurisprudence. In rendering its decision, the Ohio Supreme Court has dropped below the minimum standards of protection that states must provide to its citizens. The role of the United States Supreme Court in overseeing state criminal procedure is to impose the minimally acceptable standards below which a state may not venture. *Adamson v. California*, 332 U.S. 46 (1964). If this decision is allowed to stand, Ohio citizens will be subject to police procedures that provide less protection to citizens than what the United States Constitution demands.

The Petitioners were both arrested inside the home without warrants to search and arrest and in the absence of exigent circumstances. Ohio's decision upholding this search and arrest is in direct contradiction with the case of *Payton v. New York*. In *Payton*, after two days of intensive investigation, the police gathered evidence sufficient to establish probable cause to believe that Mr. Payton committed murder. *Payton*, 445 U.S. at 576. When there was no response to a knock on Mr. Payton's apartment door, the police summoned emergency assistance and, about 30 minutes later, used crowbars to open the door. *Id.* Although no one was there, the police, in plain view, seized a .30 caliber shell casing. *Id.* This Court invalidated the warrantless entry into the apartment requiring the police to first obtain an arrest warrant. *Payton*, 445 U.S. 602-603.

Unlike *Payton*, the facts in this case are much less remarkable. There was no probable cause to arrest any individual for any crime at 766 Staeger. There was no probable cause to arrest any individual for any crime at 765 Eugene. The matter related to a verbal argument between a former boyfriend and girlfriend one block away. Upon Mr. West's entry into Mr. Mathis' home and closing the door behind him, the Fourth Amendment stood guard to repel unpermitted intrusions. Inversely, Mr. West became a prisoner within the home for Officer Herstich stood guard at the front door, while Officer Keenan stood guard at the back door.

Respondent justified their breaking and entering into Mr. Mathis' home without a warrant because Mr. West was obstructing official business and, therefore, were in hot

pursuit. However, there was no probable cause to arrest, which is a requirement when one is in hot pursuit. The official business was to question Mr. West about the domestic dispute one block away. As admitted to by the officers, Mr. West had every right to refuse to talk to them and had every right to go into the house. If they wished to question him further, the officers were required to secure an arrest warrant, which, under the totality of the circumstances, they would not have been able to obtain from a detached magistrate. Further, Respondent justified the arrest of Mr. West because he was not privileged to assault Officer Herstich regardless of whether the arrest was legal or illegal. However, the alleged assault occurred only because Officer Herstich illegally forced himself into the house and onto Mr. West, who denied that he ever struck Officer Herstich.

With regard to Mr. Mathis, Respondent justified the entry because Officer Hamidi reasonably believed, though a mistaken belief, that a burglary was in progress. The only substantive evidence which Officer Hamidi had to arrive at such a hunch was that the front door was ajar, kicked in and the frame cracked, nothing else. However, the police created this evidence. Officer Hamidi, who stood next to Officer Herstich, made no effort to inquire about the damaged door. This was not enough to suspect that a burglary was in progress. A search warrant would not have been issued under these circumstances.

In permitting the foregoing circumstances to justify probable cause to arrest and search, the Ohio Supreme Court has greatly diminished the Fourth Amendment's capacity to protect people in their own homes. Such a diminished

capacity fell below the minimum protection drawn by this Court.

B. By Allowing Police Officers to Enter Homes Without Prior Judicial Consideration of Arrest Warrants and Search Warrants, Police Officers Will Be Able to Justify Any Warrantless Search by Making After the Fact Determinations to Support Probable Cause or Exigent Circumstances.

The Ohio Supreme Court's decision here will allow police officers to circumvent the requirement of having neutral and detached magistrates to conduct probable cause determinations, a keystone of Fourth Amendment jurisprudence. The standard for an arrest and search, independently, is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Gerstein v. Pugh* 420 U.S. 112, citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964). This Court has stated the purpose of requiring such determinations of probable cause by a detached, judicial magistrate. In *Johnson v. United States*, this Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

333 U.S. 10, 13-14 (1948). The Court has further stated, " . . . [p]robable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution." *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court discussed the evolution of the probable cause standard and the relation of an officer's mistakes when determining probable cause. This Court stated:

> Probable cause has come to mean more than bare suspicion: Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man or reasonable caution in the belief that an offense has been or is being committed.

Brinegar, 338 U.S. at 175, citing *Carroll v. United States*, 267 U.S. 132. With respect to mistakes, this Court held:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime . . . . But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Brinegar, 338 U.S. at 177. The foregoing language clearly evidences the preference for a judicial determination of probable cause whenever possible.

In relation to formulating probable cause and mistakes by officers, this Court has also addressed the issue of attempting to determine probable cause on mere hunches, and the justification for probable cause after the event occurs. In *Beck v. Ohio*, this Court stated:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. 'Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.' *Wong Sun v. United States*, 371 U.S. 471, 479-480, 83 S.Ct. 407, 413, 9 L.Ed.2d 441.

379 U.S. 89, 96 (1964).

The Ohio Supreme Court circumvented this Court's precedent in deferring probable cause determinations to neutral and detached magistrates, where there are no exigent circumstances to intrude into a citizen's home.

Here, prior to Officers Herstich and Keenan's arrival at 766 Staeger, Officer Hamidi knew the description of the male involved in the verbal argument. The male was white,

26 years of age, 6'3", 220, white male, brown hair, blue eyes, and with fair complexion. Prior to Officers Herstich and Keenan's arrival at 766 Staeger, Officer Hamidi knew that the complaining girlfriend never exhibited any physical injury. Prior to Officers Herstich and Keenan's arrival at 766 Staeger, Officer Hamidi also knew that there was no criminal activity occurring at 766 Staeger. Officer Hamidi further knew that it was standard practice to provide the race of the individual to be searched.

When Officers Herstich and Keenan arrived at 766 Staeger, Office Hamidi related that there was a verbal dispute between the suspect and his girlfriend and provided only the suspect's apparel. This is the extent of Officers Herstich and Keenan's knowledge out of 766 Staeger. When Officers Herstich and Keenan embarked on their search, they knew nothing of any criminal activity at 766 Staeger or around the neighborhood, and that they were only looking for one guy.

Officer Hamidi then proceeded to 765 Eugene. By the time he approached Officer Herstich and stood next to him, the suspect was already handcuffed and in custody and knew that Officer Keenan was at the back of the house. Officer Hamidi knew that the suspect was African-American, and that they were only looking for one individual. Also, without following police procedure, Officer Hamidi consciously failed to provide the suspect's color. The transaction or occurrence ended at that point. Without further inquiry, Officer Hamidi ventured into the house discovering, in plain view, clumps of marijuana. See *Texas v. Brown*, 460 U.S. 730 (1983) (where the doctrine of plain

view is subject to a predetermination of a justifiable entry under the Fourth Amendment). He ordered everyone not to enter the house while securing a search warrant.

Respondent presented several grounds to justify the search of the premises and arrest of Petitioners: (1) information that the suspect threatened to kill his girlfriend and her new boyfriend, (2) obstruction of official business, (3) assault, and (4) burglary in progress. These grounds were made after-the-fact. First, there was no information obtained from 766 Staeger that the suspect threatened to kill his girlfriend and her new boyfriend. At no time that any information regarding threats to kill ever developed when Officers Herstich and Keenan arrived at 765 Eugene. Officer Hamidi did not testify as such. This is a total fabrication which enabled Officer Herstich in hot pursuit of Mr. West. Officer Herstich knew that upon Mr. West entering the home, he was required to obtain an arrest warrant supported by probable cause. He could not have obtained one under the totality of the circumstances.

Further, even if he could have obtained such a warrant, there was no excuse to apply for one. Mr. West was well guarded in the home. He could not have escaped. Officer Keenan stood guard in the rear, and Officer Herstich could have stood guard in the front. See *Minnesota v. Olson*, 495 U.S. 91 (1990). If Mr. West exited the house, he could have been arrested in a public place without a warrant. *Id.* There was no legal justification for him to forcibly enter the home.

Second, Respondent justified Officer Herstich's entry

based on obstruction of official business and was in hot pursuit. This justification is flawed for the same, simple reason as outlined above. Indeed, this is a more tenuous justification, since Officer Herstich was aware of no crime that was committed, or was being committed, at 766 Staeger or 765 Eugene, or the entire neighborhood for that matter.

Third, Respondent appears to justify Mr. West's arrest based on the alleged assault upon Officer Herstich, whether or not it was legal. This justification is also flawed. No assault took place. Officer Herstich was the aggressor. Mr. West was within the confines of a protected home. At that point, if an assault occurred, it was necessary for Officer Herstich to obtain, not only an arrest warrant for Mr. West, but also a search warrant to search Mr. Mathis' home for Mr. West. This is a requirement under *Steagald v. United States*, 451 U.S. 204 (1981). However, he knew that the assault occurred only because of his illegal entry. The illegal entry was a precondition of the alleged assault. As a consequence, the assault was dependent, not independent, of the illegal entry. Under the fruits of the poisonous tree doctrine under *Wong Sun*, any evidence of assault should be suppressed, as was rightfully decided by the trial court.

Fourth, the Respondent justified the seizure of the marijuana based on Officer Hamidi's hunch that burglary was in progress. This second attempt to justify the warrantless entry by Officer Hamidi is also fabricated. Because they could not justify the first entry, Respondent contended that Officer Hamidi was permitted to make a protective sweep. When Officer Herstich entered the home to apprehend Mr. West, he smelled a poignant odor of

marijuana.[71] Further, he testified that he could even smell it in the front yard.[72] Surely, when he came upon Officer Herstich and Mr. West in the front yard, he could have smelled the odor of marijuana. Dispensing their duty to obtain a search warrant in light of the circumstances, Officer Hamidi entered the home claiming that burglary was in progress. The only evidence he had to support this claim was the cracked frame and door ajar. However, this was a hunch insufficient to establish probable cause. A cracked frame and door ajar, standing alone, would not have been a conclusion reached by a reasonable, prudent officer. See *State v. Apodaca*, 85 Or. App. 128 (1987) (a reasonably prudent officer would not have believed a burglary was in progress, where there was no response to police announcement, the door was open and the screen door broken); and see *State v. Morgavi*, 58 Wash. App. 733 (1990) (exigent circumstances may not be used as an excuse to search premises without a warrant, where garage doors were open, door hinges broken, and basement door open).

Respondent's ill-fated attempts in justifying police conduct under the totality of the circumstances fail constitutional muster and are prohibited.

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[71]T.p., Appx. __.

[72]T.p., Appx. __.

CONCLUSION

Petitioners respectfully request that the writ be issued. It is imperative that Ohio law be in accord with the standards propounded by this Court pursuant to the United States Constitution. It is clear from the foregoing that the Ohio Supreme Court fell below the minimum protection pronounced by this Court in balancing the interest of the State to fetter out crime and the interest of the citizens' fundamental right to be left alone in their own homes, in the absence of exigent circumstances. Under the court of appeal's analysis, as acquiesced by the Ohio Supreme Court, the Fourth Amendment's arrest warrant requirement is without force, and the search warrant requirement need not be supported by probable cause.

Further, although analysis of probable cause is on a case-by-case basis under a totality of the circumstances, the facts in this case present an opportunity to determine what factors, standing alone, are insufficient to sustain a finding of probable cause as a matter of law.

Dated: Akron, Ohio, 7-26-05.

Respectfully,

Robert C. Meeker

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Counsel for Petitioners
LANCE K. MATHIS and
ROY C. WEST

PROOF OF SERVICE

Pursuant to Rules 12 and 29 of the Rules of the Supreme Court of the United States, the undersigned counsel hereby certifies that three (3) copies of the Petition for Writ of Certiorari was served upon the following at his/her/its/their last known address(es), by regular United States Mail, first class, postage prepaid, on the date indicated below:

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ROY C. WEST

APPENDIX

IN THE COURT OF COMMON PLEAS
SUMMIT, COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. CR 2004
	)	01 0135(A)(B)
Plaintiff,	)	
	)	JUDGE BURNHAM
vs.	)	UNRUH
	)	
LANCE K. MATHIS (A),	)	ORDER
and ROY C. WEST (B),	)	
	)	
Defendants.	)	

This matter comes before the Court on Defendant Lance K. Mathis' Motion to Suppress Evidence and Defendant Roy West's Motion to Dismiss. Oral hearings on the Defendants' Motions were held before the Court on March 4, 2004 and March 18, 2004. The Court has considered the Defendants' Motions, the testimony and evidence presented at the March 4, 2004 and March 18, 2004 oral hearings, Crim.R. 12, the Fourth and Fourteenth Amendments to the United States Constitution, Section 14, Article I of the Ohio Constitution, and applicable law. Upon due consideration, the Court hereby GRANTS Defendant Lance K. Mathis' Motion to Suppress Evidence and GRANTS Defendant Roy West's Motion to Dismiss.

STATEMENT OF CASE AND LAW

a. Factual background.

On or about January 9, 2004 at approximately 5:45 p.m., Responding Officers with the Akron Police Department were attempting to assist Officer Hanidi, also of the Akron Police Department, who was at the scene of an alleged domestic dispute at 766 Staeger Street, Akron, Ohio 44306. The alleged suspect in the domestic dispute, after allegedly making a verbal threat to the victim, had fled the scene and it was believed that he was still in the immediate area. Officer Hanidi described the alleged suspect to the Responding Officers as wearing a three-fourth lengths coat, a t-shirt and blue jeans. The Responding Officers testified that they were not informed of the suspect's race. It was later learned that the domestic violence suspect is Caucasian.

While surveying the area around the 766 Staeger Street residence, Responding Officers Keenan and Herstich observed a man whose clothing fit the description of the alleged suspect in the domestic disturbance. This man, later identified as Defendant Roy West ("West"), was in front of 765 Eugene Street, Akron Ohio 44306 - which is approximately one block away from the 766 Staeger Street residence.

When the Responding Officers attempted to speak to West, West ran towards the 765 Eugene Street residence. West ignored the Officers' requests to "stop". Another individual, later identified as Defendant Lance Mathis ("Mathis"), who was on the front porch of the 765 Eugene Street residence, walked into the house. West followed Mathis into the house and closed the door behind him. Responding Officers Keenan and Herstich proceeded to go after West an Mathis. Responding Officer Herstich kicked

the door down and entered the 765 Eugene Street residence. Responding Officer Keenan testified that he went to the back of the house to guard the back door in the event that West and/or Mathis tried to escape through the back door.

An altercation allegedly occurred in the house between West and Officer Herstich, during which time Officer Herstich testified that he was hit at the neck. Officer Herstich took West outside of the house, where he was handcuffed.

Officer Herstich testified that after entering the house he saw marijuana in plain view and smelled marijuana. A search warrant was then secured. After the search warrant was secured, Officers Keenan and Hanidi entered the home to search for Mathis.

Both West and Mathis were indicted on January 20, 2004. West was charged with two counts: (1) Assault, pursuant to R.C. 2903.13(A), a felony of the fourth degree, and (2) Obstructing Official Business, pursuant to R.C. 2921.31(A), a misdemeanor of the second degree. Mathis was also charged with two counts: (1) Trafficking in Marijuana, pursuant to R.C. 2924.03(A), a felony of the second degree, and (2) Possession of Marijuana, pursuant to R.C. 2925.11(A), a felony of the second degree.

Currently before the Court, as previously stated, is Defendant Mathis' Motion to Suppress Evidence and Defendant West's Motion to Dismiss. Mathis and West assert that the Officers had no reason to enter their home on or about January 9, 2004 without a warrant. Upon due

consideration of the facts, evidence, and applicable law, the Court finds that when Office Herstich kicked down the door to the Defendants' residence, he was not in hot pursuit an exigent circumstances did not exist.

b. Standard of review on a Motion to Suppress.

"The decision to grant or deny a motion to suppress involves a question of law." *State v. Hamilton* (Aug. 11, 1999), Ninth App. C.A. No. 2903-M at *5. As set forth in *Hamilton*, "'[w]hen considering a motion to suppress, the trial court assumes the-role of trier or fact and thus, stands in the best position to resolve issues of fact and witness credibility.'" Id. Appellate review of a trial court's ruling on a motion to suppress is de novo. Id. As stated in *State v. Russell* (1998), 127 Ohio App.3d 414, "an appellate court must review the trial court's findings of historical fact only for clear error, giving due weight to inferences drawn from those facts by the trial court."

c. Applicable law.

"The Fourth Amendment to the United States Constitution and Section 14, Article I, o the Ohio Constitution require police officers to obtain a warrant based on probable cause before conducting a search." *State v. Fry* (Dec. 14, 1994), Ninth App. C.A. No. 16718 at *5-6. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Section 14, Article I of the Ohio Constitution, through almost identical language, provides these same protections to its people." *State v. Hamilton*, supra, Ninth App. C.A. No. 2903-M at **6. Section 14, Article I of the Ohio Constitution states:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

With regard to the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution, the Ninth District Court of Appeals provided in State v. Hamilton, supra, Ninth App. C.A. No. 2903-M at **6-11 as follows:

> The tenents of the Fourth Amendment are not impenetrable. Certain `exceptions' to the warrant requirement have been carved out of the parameters of the Fourth Amendment. Nonetheless, reasonableness remains as the touchstone of Fourth Amendment jurisprudence. [Citation omitted.] Accordingly, a search conducted without a warrant supported by

probable cause is per se unreasonable. [*Citation omitted*]

In *Payton v. New York* (1980), 445 U.S. 573, 590, 63 L.Ed.2d 639, 653, 100 S.Ct. 1371, the United States Supreme Court held that absent exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amendment. * * *

* * *

* * * The exigent circumstances exception relies on the premise that the existence of an emergency situation, demanding. urgent police action, may excuse the failure to procure a search warrant. See *Welsh v. Wisconsin* (1994), 466 U.S. 740, 750, 80 L.Ed.2d 732, 743, 104 S.Ct. 2091. Under the exigent circumstances exception, a warrantless entry may be required to secure evidence that is in the process of being lost or destroyed. See *Johnson v. United States* (1948), 333 U.S. 10, 15, 92 L.Ed 436, 441, 68 S.Ct. 367; *United States v. Sangineto-Miranda* (C.A. 6, 1988), 859 F.2d 1501, 1511; see, also, *United States v. Morgan* (C.A. 6, 1984), 743 F.2d 1158, 1161 (`Absent exigent circumstances, police officers may not enter an individual's home or lodging to effect a warrantless arrest or search.') Such warrantless entries and searches are presumptively unreasonable. [Citation omitted.] Therefore, the government bears the burden of demonstrating exigency. [Citations omitted.] Accordingly, `a warrantless entry into the home * * * effected without an objectively reasonable

basis for concluding that the destruction of evidence is imminent, does not pass constitutional muster.' *United States v. Radka* (C.A. 6, 1990), 904 F.2d 357, 361.

In Radka, the United States Sixth Circuit Court of Appeals set forth a two-prong test for determining the validity of a warrantless entry based upon the exigency of the imminent destruction of evidence:

> A warrantless entry to prevent the loss or destruction of evidence is justified, if the government demonstrates: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent. The mere possibility of loss or destruction of evidence is insufficient justification. Affirmative proof of the likelihood of the destruction of evidence, along with the necessity for warrantless entry are required.

[*Citations omitted.*] The seriousness of the offense being investigated is another factor that must be considered in determining whether the exigency justified a warrantless entry. [Citation omitted.] In considering the officer's determination that exigent circumstances existed at the time necessitating a warrantless entry, this Court must consider `the totality of the circumstances and the `inherent necessities of the situation at the time." [Citations omitted.]

* * *

The Court in *Hamilton* ultimately held that exigent circumstances existed where the police officer witnessed several minors on the porch of the home; the police saw the minors go into the home where a party was taking place; the police officer saw open containers of alcohol through the window of the home; the police officer saw a minor appearing to be about thirteen (13) look through the curtain; and he heard one of the individuals say "Oh my God, police". *Id.* at * 11. In affirming the trial court's denial of the defendant's motion to suppress, the Court emphasized that based upon the totality of the circumstances and the evidence the officer "had reasonable cause to believe that there was a likelihood of the imminent destruction of evidence." *Id.* at * 12.

In support of their Motion, the Defendants refer the Court to *Village of Blanchester v. Hester* (1992), 81 Ohio App.3d 815, 818 where the court cited *United States v. United States Dist. Court* (1972), 407 U.S. 297, 313, 92 S.Ct. 2125, 2134 for the position that the "'physical entry of the home is the chief evil against which .the wording of the Fourth Amendment is directed * * * . '" *Hester* also noted that "[absent probable cause and exigent circumstances, searches and seizures inside a home without a warrant are presumptively unreasonable." *Id.*, citing *Payton v. New York* (1980), 445 U.S. 573, 590, 100 S.Ct. 1371, 1382. Hester further noted that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Id.* at *6-7, citing *Welsh v. Wisconsin* (1984), 466 U.S. 740, 749-750, 104 S.Ct. 2091,

2097. *Welsh* recognized that "the gravity of the underlying offense is an important factor iii determining whether an exigency exists." *Welsh v. Wisconsin*, supra, 466 U.S. at 753. "When the government's interest is only to arrest for a minor offense, the presumption of unreasonableness that attaches to a warrantless arrest in a private home is difficult to rebut." *Village of !Blanchester v. Hester*, supra, 81 Ohio App.3d at 818, *Welsh v. Wisconsin*, supra, 466 U.S. at 750-751.

In *Hester*, a police officer witnessed the defendant, during the operation of his vehicle, twice fail to yield to the right of way. The defendant failed to stop to the officer's pursuit and eventually pulled into his own driveway. The officer followed the defendant into his driveway and informed the defendant to stop. In response to the officer's instructions, and before entering his residence, the defendant told the officer that "'Unless you have a warrant, get off my property". *Id.* 817. By this time, a second police officer arrived at the scene. The police officers followed the defendant into his home and arrested him. The defendant's motion to suppress was ultimately granted on the basis that the "hot pursuit" and exigent circumstances exceptions to the warrantless arrest and entry did not exist. *Id.* at 819-820. The court of appeals in Hester, in affirming the lower court's decision, noted that "[i]n this case, appellant failed to meet its burden of demonstrating exigent circumstances" and that "[a] minor traffic offense such as failure to yield cannot justify a warrantless arrest in the home." *Id.* 819.

While the State has referred the Court to *Minnesota v. Olson* (1990), 495 U. S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85, the Court finds that this case actually supports the

Defendants' position. In Olson, the police were in pursuit of a suspect allegedly involved in a robbery-murder. After identifying the home in which the suspect was allegedly staying, the police telephoned the home and testified that they heard a man's voice in the background say "tell them I left". *Id.* at syllabus. Without seeking permission and with weapons drawn, the police entered the home, found the defendant hiding in a closet, and arrested him. The court ultimately found that, even though the underlying alleged crime involved a robbery-murder, exigent circumstances did not exist to justify a warrantless entry into the home. The court emphasized that the suspect was in the home, that he was going nowhere, and that "[i]f he came out of the house he would have been promptly apprehended." *Id.* at 102. The same is true in the instant matter.

With regard to the instant matter, none of the exceptions to the warrantless entry of the residence are applicable. Specifically, the Court finds that neither the hot pursuit nor the exigent circumstances are applicable.

Prior to entering the Defendants' residence, neither officer was aware of whether any violation of law ever occurred. Prior to entering the residence, neither officer observed whether a violation of law was even being committed in their presence. The residence was secured by Officer Keenan standing guard at the back door. The residence could have been secured b Officer Herstich standing guard at' the front door without entering the residence. As in *Olson*, if the Defendants came out they could have been promptly apprehended. See, *Minnesota v. Olson*, supra, 495 U.S. at 102. Further, the underlying

alleged verbal domestic dispute does no demonstrate exigent circumstances justifying `she warrantless entry into the home. WHEREFORE, upon due consideration and for good cause shown, the Court GRANTS Lance K. Mathis' Motion to Suppress Evidence. Further, considering that the allegations of assault an obstruction of justice against Defendant West were the result of the unlawful entry and arrest, the court GRANTS Roy West's Motion to Dismiss.

CONCLUSION

WHEREFORE, for the reasons set forth above and upon due consideration of the i testimony and evidence, the Court GRANTS Defendant Mathis' Motion to Suppress Evidence and GRANTS Defendant West"s Motion to Dismiss.

IT IS SO ORDERED.

JUDGE BRENDA
BURNHAM UNRUH

Assistant Prosecuting Attorney Holly Reese
Attorneys Michael B. Bowler/Robert C. Meeker

STATE OF OHIO	)	IN THE COURT OF
	)ss:	APPEALS
COUNTY OF SUMMIT	)	NINTH JUDICIAL DISTRICT

STATE OF OHIO Appellant v. LANCE K. MATHIS (A) and ROY C. WEST(B) Appellees	C.A. Nos. 22039 22040 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2004 010135 (A)(B)

DECISION AND JOURNAL ENTRY

Dated: December 15, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge

{¶1} Appellant, the State of Ohio, has appealed the decision of the Summit County Court of Common Pleas granting co-Defendant, Roy West's motion to dismiss and

co-Defendant, Land Mathis' motion to suppress.

I

{¶2} On January 9, 2004, Officer Hamidi of the Akron Police Department responded to a domestic dispute on Staeger Street in Akron, Ohio. The alleged suspect had fled the scene, after allegedly making a verbal threat to the victim. Officers Keenan and Herstich, from the Akron Police Department also responded as backup to the domestic dispute calf, but arrived after the alleged suspect had fled.

{¶3} Believing the suspect to be in the immediate area, Officer Hamidi described to responding Officers Herstich and Keenan the suspect's clothing and that such suspect threatened to kill his girlfriend; Officer Hamidi did not mention that the suspect was Caucasian. While patrolling the area, Officers Herstich and Keenan noticed an African-American roan, Roy West ("West"), wearing clothes that matched the description given by Officer Hamidi. When Officer Herstich asked West to talk with them, he took flight, ignoring the Officers' requests to stop.

{¶4} Lance Mathis ("Mathis") had been sitting on the front porch of his house, not far from where the officers dad initially tried to stop West. He got up and was walking into his house when West carne up and followed Mathis into his -residence and closed the door behind them. Officer Herstich, who had been following West, kicked open the front door to Mathis' house and entered the residence. Officer Keenan testified that while Officer Hertich was at the front door, he had gone to the back of the house to guard the

back door.

{¶5} After Officer Herstich had entered Mathis' house, he allegedly got into an altercation with West. Officer Herstich testified that West hit him in the neck. Officer Herstich took West outside and tried to handcuff him.

{¶6} While Officer Herstich wrestled to restrain West on Mathis' front yard, Officer Hamidi arrived on the scene. Both officers testified to smelling strong odors of marijuana while on Mathis' front yard. Unaware of exactly what was happening at Mathis' house, Officer Hamidi presumed there was a burglary in progress, due in part to the ajar door which Officer Herstich had kicked open. Officer Hamidi entered Mathis' house to assure that there were no other perpetrators at the scene. Officer Hamidi smelled and observed "golf ball sized" clumps of marijuana throughout the home. Following this trail of marijuana, Officer Hamidi, now accompanied by Officer Keenan, found and arrested Mathis who was hiding in the basement surrounded by several bags of marijuana. Based on this evidence, the Officers obtained a search warrant for Mathis' house.

{¶7} West was indicted under R.C. 2903.13 for Assaulting a Police Officer, and R.C. 2921.31(A) for Obstructing Official Business. Both charges were dismissed following Defendant West's motion to dismiss on the grounds that the allegations of assault and obstruction of justice were the result of an unlawful entry and arrest.

{¶8} Mathis was indicted under R.C. 2925.03(A)(2) for Trafficking in Marijuana and R.C. 2925.11(A) for

Possession of Marijuana. He pled not guilty. Mathis filed a motion to suppress the evidence seized by the police, alleging that the police illegally entered his house. The trial court held an evidentiary hearing and on March 30, 2004, the trial court granted Mathis' motion to suppress evidence, and dismissed the indictment against West. The State has appealed, raising one assignment of error as to each defendant.

II

Assignment of Error Number One

"THE TRIAL COURT COMMITTED ERROR WHEN DISMISSING THE INDICTMENT [AGAINST WEST] IN THIS CASE"

{¶9} In its assignment of error pertaining to West, the State has alleged that the trial court erred in suppressing evidence regarding the assault charge and in dismissing the indictment against West. We agree.

{¶10} The trial court suppressed evidence and dismissed the charges against West, finding that they were the result of an unlawful entry and arrest. The State argues that the Officers had reasonable suspicion to stop and question West since he fit the description of the suspect they had been searching for. Further, the State maintains that West had no expectation of privacy and no standing to raise a Fourth Amendment claim regarding the search of Mathis' house. Finally, the State claims that the Officers' entry into Mathis' house was proper, falling under the hot pursuit

exception to the warrant requirement. Based on the above, the State concludes that the trial court erred in granting West's motion dismiss.

{¶11} A trial court makes both factual and legal findings when ruling on a motion to suppress. *State v. Jones*, 9th Dist. No. 20810, 2002-Ohio-1109, at L9. An appellate court is to accept the trial court's findings of fact that are supported by credible evidence, as the trial court is in the best position to evaluate questions of fact, credibility, and weight of the evidence. *State v. Miller* (May 23, 2001), 9th Dist. No. 20227, at 5. However, an appellate court reviews de novo the question of whether an officer had reasonable suspicion to make an investigatory stop, which is the first issue to be decided in this case. *Jones* at ¶9, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S. Ct. 1637, 134 L.Ed.2d 911.

{¶12} "A law enforcement officer must have a reasonable, articulable suspicion that a person is or has been engaged in criminal activity before he is justified in stopping [him.]" *State v. VanScoder* (1994), 92 Ohio App.3d 853, 855, citing *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L.Ed.2d 889. After identifying the facts known to the police officer at the time of the stop, an appellate court must decide whether, under a standard of objective reasonableness, those facts would give rise to reasonable suspicion justifying a stop. Ornelas, 517 U.S. at 696-697. "No further inquiry beyond the requirement of reasonable suspicion is necessary or warranted." *State v. Carlson* (1995), 102 Ohio App.3d 585, 593.

{¶13} In determining whether a stop was objectively reasonable, the court must consider the totality of the circumstances. *State v. Anderson* (1995), 100 Ohio App.3d 688, 692. "[T]he circumstances surrounding the stop must `be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" *State v. Bobo* (1988), 37 Ohio St.3d 177, 179, certiorari denied (1988), 488 U.S. 910, 109 S. Ct. 264, 102 L.Ed.2d 252, quoting *United States v. Hall* (C.A.D.C. 1976), 525 F.2d. 857, 859.

{¶14} If evidence is obtained pursuant to an unlawful stop of an individual such evidence may be excluded. However, in this case, we find that the initial attempt to stop West was proper. Officer Herstich stopped West due to his belief that West was involved in a domestic dispute. Consistent with the description given to Officer Herstich, West was wearing a red shirt, blue jeans, and a dark coat. The Officers spotted West in the area surrounding the residence in which the alleged domestic dispute took place. Officer Hertich was told that the suspect had threatened to kill his girlfriend and her new boyfriend.

{¶15} The fact that West is African American and the actual domestic dispute suspect was Caucasian does not affect the validity of the stop. Officer Herstich was unaware of the suspect's race because of a problem with his computer. "[A] police officer's mistake of fact will not lead to the suppression of evidence where the mistake was 'understandable' and a reasonable response to the situation facing the police officer. *State v. Fain* (Jan. 21, 1998), 9th Dist. No. 18306, at 4, citing *Hill v. California* (1971), 401

U.S. 797, 804, 91 S. Ct. 1106, 28 L.Ed.2d 484. The Officers were searching for a man in the general area surrounding the victim's residence who had, from what they had been told, threatened to kill the victim. At the time of the stop, the Officers knew only that West met the description they had been given of the suspect. Their mistake as to his race did not affect the validity of the stop, since they were unaware of race at the time. See *State v. Kaszas* (Sept. 20, 1995), 9th Dist. No. 2413-M, at 9.

{¶16} Believing West to be the domestic dispute suspect they had been searching for, the Officers stopped the police cruiser. Officer Herstich got out of the car and identified himself to West as an Akron Police Officer. Officer Herstich testified that as soon as he told West that they needed to talk to him, West took off on foot. Officer Herstich then began to follow West, who entered Mathis' house and shut the door. Officer Herstich, still pursuing West, kicked down Mathis' door and entered his house, whereupon West allegedly hit Officer Herstich. West argues that Officer Herstich's entry into Mathis' house was a violation of his Fourth Amendment rights and therefore, evidence gained against him while the Officer was inside Mathis' house should be excluded. We disagree.

{¶17} The Fourth Amendment confers the right to refuse consent to entry of a defendant's residence. *State v. Robinson* (1995) 103 Ohio App.3d 490. To further the Fourth Amendment's guarantee against unreasonable searches and seizures, evidence obtained by an unlawful entry into one's home may be excluded from trial. *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081.

Generally, however, guests do not have standing to raise Fourth Amendment issues for invasions of third party homes because they lack the requisite expectation of privacy. State v. Burton (May 25, 1988), 9th Dist. No. 13408, at ¶3.

{¶18} Here West was not the owner of the home in which he was found. Thus, his expectations of privacy wore not violated by the entry of Officer Herstich into Mathis' home.

{¶19} Even if West had standing and Officer Herstich's search was illegal, the assault on Officer Herstich was still sufficiently distinguishable from Officer Herstich's entrance into Defendant Mathis' home so as to purge itself from the taint of the search. Under the "fruits of a poisonous tree" doctrine, only evidence that was obtained through the exploitation of the search is capable of exclusion. *State v. Stringfield* (Sept. 4, 1991), 9th Dist. No. 1991, at 2-3, citing *Wong Sun v. United States*, (1963), 371 U.S. 471, 487, 83 S. Ct. 407, 9 L.Ed.2d 441.

{¶20} West's assault on Officer Herstich was created by West's own misconduct and not an exploitation of the search by Officer Herstich. Therefore, such evidence does not fall under the exclusionary rule as it is separate and distinct from Officer Herstich's initial entry into Mathis' home. See *State v. Kelly* (Sept. 2.4, 1993), 2nd Dist No. 3007, 1993 Ohio App. LEXIS 4680 at * 11. "[A]n observation of a fresh crime committed during or after the arrest is not to be suppressed even if the arrest is unlawful." (Emphasis omitted.) *Akron v. Holmes*, 9th Dist. No. 21590, 2004-Ohio-832, at T13, appeal denied (2004), 102 Ohio

St.3d 1532, quoting State v. All, 154 Ohio App.3d 493, 2003-Ohio-5150 at ¶13.

> "This court has also held that where a person who is being arrested commits a new crime during or after the arrest, the conduct witnessed which constitutes that new crime' need not be suppressed merely because the initial arrest, which may be the motive for the new crime, turns out to be unlawful. * * * It is clear that further criminal acts, such as obstructing official business and resisting arrest, are not legitimatized by Fourth Amendment transgressions." (Internal citations omitted.) Holmes at ¶14.

Such a ruling is in line with policy discouraging assaults on police officers. The evidence pertaining to the assault on Officer Herstich should not have been excluded. Even if the initial entry into Mathis' residence was unlawful, evidence of West's assault on the officer is admissible.

{¶21} Having found that the trial court erred in suppressing the evidence pertaining to West's alleged assault on Officer Herstich, we turn to the second part of the State's assignment of error: whether it was appropriate for the trial court to dismiss the charges against West.

{¶22} When considering a motion to dismiss charges, the trial court may only review the indictment to determine whether it is valid on its face. If the indictment is valid, the trial court may not dismiss it.

"This Court has previously held that, in considering

whether to dismiss an indictment, a trial court should only look at the face of the indictment: [I]n reviewing the propriety of a criminal indictment issued under Ohio law, a court may determine only whether the indictment is valid on its face: The Ohio Rules of Criminal Procedure * * * do not allow for `summary judgment' on an indictment prior to trial. *** A motion to dismiss an indictment tests the sufficiency of the indictment, `without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.'" (Citations omitted.) *State v. Barsic* (May 10, 1995), 9th Dist. No. 94CA005883, at 3-4.

{¶23} We find that it was improper for the trial court to dismiss the charges against West. The trial court's consideration of West's motion to dismiss should have been limited to a review of the face of the indictment. West does not allege that the indictment was invalid. Whether West is guilty of the offenses is not before us. The only issue before this court now is whether it was proper for the trial court to dismiss the indictment, and we have found that it was not.

{¶24} The State's assignment of error is well taken. The trial court erred in granting West's motion to dismiss. The evidence of West's alleged assault of Officer Herstich should not have been suppressed, and the charges against West should riot have been dismissed.

II

Assignment of Error Number Two

"THE TRIAL COURT COMMITTED ERROR WHEN SUPPRESSING THE EVIDENCE IN [THE] CASE [AGA;'INST MATHIS]."

{¶25} In its assignment of error pertaining to Mathis, the State has contended that the trial court erred in suppressing, the evidence against Mathis in this case. We agree.

{¶26} Mathis has contended that the evidence against him was properly suppressed because the police entered his home illegally. There were two separate warrantless entries into Mathis' house. 'The first entry was when Officer Herstich had been pursuing West and followed him to the door of Mathis' house and then proceeded to kick down the door to arrest West. The second entry occurred a few minutes later. Officer Herstich was outside of the Mathis house arresting West. Officer Hamidi then appeared on the scene. Officer Hamidi asked Officer Herstich where Officer Keenan was. Officer Herstich replied that he did not know. Officer Herstich was engaged in trying to arrest West, and before he could explain to Officer Hamidi what was going on, Officer Hamidi had left.

{¶27} Seeing the front door of the Mathis house kicked in, Officer Hamidi testified that he thought that there was a burglary in process. Before Officer Hamidi entered the house, he testified that he had seen large portions of marijuana on the floor and had smelled it coming out of the house. Officer Hamidi then drew his weapon and started searching the house for burglars. Officer Keenan also entered the house with his weapon drawn and followed

Officer Hamidi. They found Mathis in the basement. Mathis was handcuffed and taken outside. The Officers then obtained a search warrant to search for the drugs based upon the marijuana they had observed.

{¶28} The propriety of the trial court's decision to exclude the evidence as it relates to the charges against Mathis depends on whether one or both of the entries into his home were permissible: If the entry into Mathis' residence were legal, then the marijuana that was seen in plain view is properly admissible. "Under [the plain view] doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the item's discovery was lawful and it was immediately apparent' that the item was incriminating." *State v. Waddy* (1992), 63 Ohio St-3d 424, 442, certiorari denied (1992), 506 U.S. 921, 113 S. Ct. 338, 121 L.Ed2d 255, quoting *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L.Ed.2d 564.

{¶29} The police may lawfully enter a private residence without a warrant if the entry was made upon exigent circumstances. *State v. Applegate* (1994), 68 Ohio St.3d 348, 349. A common bred of exigent circumstances is when an officer is in hot pursuit of a suspect. *United States v. Radka* (1990), 904 F.2d 357, 361. When evaluating the exigencies of entering. a home a totality of circumstances approach is taken. Id.

{¶30} The initial entry into Defendant Mathis' home occurred as Officer Herstich pursued Defendant West. This initial entry is justifiable under the "hot pursuit" exception to the warrant requirement. At the time Officer

Herstich entered the Defendant's house he was pursuing, whom he reasonably thought, was a man involved in a domestic dispute who had threatened to kill his girlfriend and had just fled from the police.

{¶31} The Officers were justified in chasing West into Mathis' house without a warrant. A suspect may not avoid arrest simply by outrunning the police and entering a residence. *United State v. Santana* (1976), 427 U.S. 38, 42-43, 96 S. Ct. 2406, 49 L.Ed.2d 300. "[A] suspect may not defeat an arrest which has been set in motion in a public place * * * by the expedient of escaping to a private place." Id at 43.

> "[W]hen officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a' misdemeanor." *Middletown v. Flinchum* (2002), 95 Ohio St. 3d 43, 45.

{¶32} We find that since Officer Herstich was in hot pursuit of West when he entered Mathis' home, the entry was legal and not a violation of Mathis' Fourth Amendment rights. Therefore, the evidence gathered through Officer Herstach's entry and while on Mathis' front yard should not be excluded as it was in plain view after he legally entered Mathis' house.

{¶33} The second entry -presents different circumstances. Officer Hamidi's entry and the evidence

garnered from his search is distinct from the evidence obtained from Officer Herstich's entry as the exigencies related to Officer Herstich's search had passed by tie time Officer Hamidi arrived on the scene.

{¶34} To determine the validity of Officer Hamidi's search we must consider the basis for Officer Hamidi's search while recognizing that the law affords police officers room for reasonable mistakes. *Gerstein v. Pugh* (1975), 420 U.S. 103, 111-112, 95 S. Ct. 854, 43 L.Ed.2d 54. Further, evidence should not be suppressed when the police reasonably respond to situations to which they are confronted. *Hill v. California* (1971), 401 U.S. 797, 804, 91 S. Ct. 1106, 28 L.Ed.2d 484.

{¶35} Officer Hamidi conducted his search under the mistaken belief that a burglary was in progress at Mathis' residence. The State contends that Officer Hamidi reasonably believed this because 1) he had received an emergency call from Officer Herstich, 2) Officer Herstich was arresting Defendant West on the front lawn, 3) the front door at Mathis' house was kicked in, 4) Officer Hamidi did not know where Officer Keenan was, 5) Officer Hamidi knew the procedure for responding to a burglary, and 6) Officer Hamidi had already gone inside before Officer Herstich could finish informing him of the situation. While not all of these factors could reasonably have led Officer Hamidi to believe a burglary was in progress, we find that the combination of the factors present could reasonably lead a trained officer to Officer Hamidi's conclusion.

{¶36} Since Officer Hamidi reasonably believed

a burglary was in progress, exigent circumstances existed to justify his entry and a protective sweep of Mathis' home. A protective sweep, which is limited to areas where an individual may be hiding, is appropriate when officers have a reasonable belief based on articulable facts that the area searched harbors an individual posing a threat to the Officers or others. *Maryland v. Buie* (1990), 494 U.S. 325, 327-328, 110 S. Ct. 1093, 108 L.Ed.2d 276, certiorari denied (1991), 498 U.S. 1106, 111 S. Ct. 1011, 112 L.Ed.2d 1094.

{¶37} In this case, Officer Hamidi was looking for a burglar, potential victims, accomplices, and Officer Keenan. While executing this protective sweep, Officer Hamidi saw and smelled marijuana in plain view. When an Officer is properly on the premises, evidence found in plain view is not subject to the exclusionary rule. State v. Fry (Aug. 28, 1991), 9th Dist No. 14996, at 4. Based on the foregoing, we find that the State's assignment of error concerning Mathis is well taken.

{¶38} The State's assignments or error are sustained. The judgment of the Summit County Court of Common Pleas is reversed and remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

BETH WHITMORE
FOR THE COURT

BOYLE, J.
CONCURS

CARR, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

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The Supreme Court of Ohio

State of Ohio,
Appellee,
v.
Lance K. Mathis (A) and
Roy C. West (B),
Appellants.

Case No. 05-218

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Summit County Court of Appeals; Nos. 22039 and 22040)

THOMAS J. MOYER
Chief Justice